

Proposed Changes to OMB Circular A-76 (Revised)

1. Draft Circular No. A-76, proposed by the Office of Management and Budget (OMB), has totally revised the concept and approach to an A-76 study. The draft Circular has dropped the Steering Committee Concept for administering the A-76 study and the Commercial Activity Program Manager position and replaced them with new positions entitled the Agency Tender Official (ATO) and the 4e Official.
2. According to the draft Circular, the 4e Official shall be an Assistant Secretary or equivalent level official with responsibility for implementing the draft Circular. The 4e Official shall appoint the ATO, Contracting Officer (CO), Human Resource Advisor (HRA), Source Selection Authority (SSA) and the Administrative Appeal Authority (AAA).
3. The ATO is given the responsibility to develop and certify what the OMB Circular refers to as the Agency Tender, which is currently referred to as the Management Study or the Most Efficient Organization (MEO). The ATO is to represent the Agency Tender during the source selection process and in any subsequent appeals. The ATO is to be independent of the CO, the SSA and the AAA. The ATO position is to be held by an inherently governmental official and for the purpose of filing appeals, the ATO is considered a directly interested party. This is a change from the previous procedure, which did not allow appeals by the Management Study/MEO.
4. The role of the CO is revised in the draft Circular. The CO shall be independent of the activity being competed, the ATO and the AAA. The CO is responsible for designation of the Performance Work Statement (PWS) Team and assisting the team in developing the PWS. Under the current procedure set forth in DA Pam 5-20, the Commercial Activity Study Team writes the PWS.
5. The draft Circular sets forth in more detail than previously provided in DA Pam 5-20 and OMB Circular No. A-76 - Revised Supplemental Handbook, the role and responsibilities of the HRA. This position is to be filled by an inherently governmental official who is a HR expert and shall act independently of the CO, SSA and AAA. The HRA is to provide guidance on employee and labor relations issues and assist the ATO and MEO Team with human resource related requirements during development of the Agency Tender.
6. The draft Circular changes the time for completion of an A-76 study. The draft Circular provides that the completion of a Standard Competition shall not exceed 12 months from the date of public announcement unless the 4e Official grants a one-time 6 month extension subject to approval by the Deputy Director

of Management of OMB. The OMB Circular No. A-76 - Revised Supplemental Handbook, March 1996, provided for 18 months to complete a study for a single activity.

7. The draft Circular requires that the PWS be performance-based with measurable performance thresholds and enables it to encourage innovations. (Emphasis added). The current OMB Circular and DA Pam 5-20 do not encourage innovations in the submissions by offerors or the Government Management Study/MEO and require that the offerors and the Management Study meet the requirements of the PWS.
8. Under the draft Circular, Agencies conducting an A-76 study are required to issue the solicitation within 8 months of the A-76 study start date and if the Agency is unable to issue the solicitation within this timeframe, the 4e Official shall notify the Deputy Director for Management of OMB in writing, no later than 7 months after the start date. The present guidance set forth in DA Pam 5-20 and the OMB Supplemental Handbook do not contain a time frame for the issuance of the solicitation.
9. The draft Circular gives the CO discretion to select the type of contract to be used from the list set forth in the draft Circular. This list consists of (a) sealed bids; (b) negotiated procurements using Low Priced Technically Acceptable Source Selection Procedures; (c) negotiated procurements using Cost/Technical Tradeoff Source Selection Procedures with an Integrated Evaluation Process; or (d) Negotiated Procurements using Cost/Technical Tradeoff Source

Selection Procedures with a Phased Evaluation Process. DA Pam 5-20 merely states that the CO will identify the contract type to be used in the solicitation.

10. A negotiated procurement using Cost/Technical Tradeoff Source Selection Procedures is one in which cost or price may be traded off against factors governing technical performance or quality. A Cost/Technical Tradeoff does not include tradeoff processes where the technical factor is graded on a Pass/Fail, Go/No-Go or similar rating system where all offerors meet the same level of performance and where cost or price is then traded off only against non-technical factors. The Integrated Evaluation Process may be used in competitions for information technology activities performed by Agency personnel, contracted commercial activities, new requirements or segregable expansions where an Agency Tender will be submitted or any other commercial activities where the 4e Official receives written approval from OMB prior to issuance of the solicitation. When using the Integrated Evaluation Process, the Agency Tender may be eliminated from the competitive range and the Performance Decision may be based on factors other than lowest cost.

11. A Phased Evaluation Process is one where an Agency determines technical capability in Phase One and evaluates cost in Phase Two. The Performance Decision is based on the lowest cost of all technically acceptable offers and tenders. The SSA shall not end Phase One and commence Phase Two until the SSA agrees that the Agency Tender is technically acceptable. A detailed description of how Phase One and Phase Two are to be performed is set forth at pages B-14 and B-15 of the draft Circular.

12. Government Furnished Property is treated differently in the draft Circular than in DA Pam 5-20, paragraph 3-10d. The DA Pam requires that a cost-benefit analysis be performed to decide if it would be more beneficial to provide prospective contractors with Government Furnished Property. Under the draft Circular, the determination to provide Government Furnished Property must be justified in writing and approved by the 4e Official.

13. To decrease the complexity of performing source selections in Standard Competitions, the draft Circular allows the CO to include a cross-reference Compliance Matrix in Section L of the solicitation. This is a new provision not previously allowed in an A-76 study.

14. The draft Circular requires that the solicitation explicitly state which requirements will not be applied to the Agency Tender. The draft Circular provides that the following requirements shall not apply to an Agency Tender:

- a. labor strike plan

- b. small business strategy
- c. subcontracting plan goal
- d. participation of small disadvantaged businesses
- e. licensing or other certification and
- f. past performance criteria

15. Under the draft Circular, the Management Study/MEO is replaced with what is referred to as the Agency Tender. The Agency Tender is the Agency response to the solicitation. The Agency Tender is considered a procurement sensitive document until a Performance Decision is reached. The ATO is to develop the Agency Tender, which shall be prepared in accordance with the requirements of Sections L and M of the solicitation. Under the current guidance, there is no requirement that the Management Study meet the requirements of Sections L and M of the solicitation, however, rulings by the General Accounting Office have established that the Management Study must comply with Sections L and M of the solicitation. The draft Circular is merely incorporating these rulings into the A-76 process. The Agency Tender shall include a MEO; an Agency Cost Estimate developed in accordance with Attachment E of the draft Circular; a Quality Control Plan; and a Phase-in Plan. The MEO may be comprised of either (1) Federal employees or (2) a mix of Federal employees and existing contractor support. New contracts, however, shall not be created as part of the Agency Tender development. This is a change from DA Pam 5-20, which did not prohibit the use of new contracts as part of the MEO.

16. Prior to submission of the Agency Tender to the CO, changes to the Agency Tender are at the discretion of the ATO. After the due date stated in the solicitation, the ATO can make changes to the Agency Tender only if it is the result of negotiations with the SSA, official OMB Office of Personnel Management guidance, or Agency cost rate/factor updates approved by the 4e Official. The Agency Tender may also be revised if no private sector offers or public reimbursable tenders have been opened and if the CO extends the submission date for all offers and tenders. Other changes to the Agency Tender shall not be permitted. Under DA Pam 5-20, no changes to the MEO in-house cost estimate are permitted after the due date for submission of proposals/bids.

17. Under the draft Circular, the ATO is to develop and certify the Agency Cost Estimate, and shall include a Quality Control Program and Phase-in Plan in the Agency Tender. The ATO is to sign the Standard Cost Comparison Form (SCF), which is the decision making document, and certify that the Agency Tender is complete and otherwise reflects the requirements of the Circular. The ATO is also responsible for delivering the Agency Tender to the CO. All communications between the ATO and the SSA are to be in writing and submitted through the CO.

Under DA Pam 5-20, the Independent Reviewer certified the MEO's Cost Estimate.

18. A new provision set forth in the draft Circular is that if the ATO does not submit the Agency Tender to the CO on or before the due date, the CO shall not open any received offers or tenders and must notify the ATO and 4e Official that the Agency Tender was not submitted. The ATO must provide the 4e Official with a written rationale for not submitting the Agency Tender on time and the 4e Official may instruct the CO to return received offers and tenders and amend the solicitation allowing additional time for resubmission of all offers and tenders or instruct the CO to proceed with the source selection without the Agency Tender. Under the draft Circular, it is possible that the organization under study will not participate in the competition. The present A-76 Circular requires that the Government organization under study participate in the competition.

19. If no private sector offers are submitted or those received are found to be non-responsive or not responsible, the Agency shall hold discussions with the private sector sources and document in writing:

- a. Any restrictive, vague, confusing or misleading portions of the solicitation;
- b. Possible revisions to the solicitation to encourage participation;
- c. The reasons provided by sources for not submitting responses; and;
- d. The reasons offers or tenders were either not responsive or not responsible.

The draft Circular does not define or identify who the private sector sources the ATO is to hold discussions with are, but it must be assumed that they are private sector companies who had shown interest in submitting a proposal. The CO and SSA are to evaluate the results of these discussions and propose a course of action in a written document to the 4e Official. The CO shall provide a copy of this written document to the PWS Team, ATO and the public.

20. The 4e Official will evaluate the CO's written documentation and make a determination to either (a) revise the solicitation or (2) implement the Agency Tender. Therefore, under the draft Circular, it is possible to have a situation where there is no competition with the private sector and the Agency Tender is simply implemented.

21. The draft Circular also revises the source selection process. Under the draft Circular, the SSA is to evaluate all offers concurrently including the Agency Tender. Neither the SSA nor the CO are to direct or request adjustments to the

Agency Tender that would identify a private sector or public reimbursable offeror's proprietary methodology or require, direct or make specific changes to the Agency Tender including the approach used by the Agency and Agency staffing requirements. The SSA or CO may, however, question whether sufficient resources have been included in the MEO. A public reimbursable offeror is a federal agency that could perform a commercial activity for another federal agency on a reimbursable basis via a commercial Inter-Service Support Agreement (ISSA).

22. The draft Circular changes the structure and make up of the PWS Team and the Government/MEO Team. Under DA Pam 5-20, paragraph 4-9, the PWS can be developed by separate PWS and MEO/Management Study Teams working independently or jointly to develop the PWS requirements with the Management Study Team splitting off once the workload has been identified. There must, however, be continued coordination between the teams throughout the process as neither team can operate in a vacuum. Under the draft Circular, members of the PWS Team cannot be members of the MEO Team and members of the MEO Team cannot be members of the PWS Team in order to avoid the appearance of a conflict of interest.

23. In addition, members of the MEO Team, directly affected personnel and any individuals with detailed knowledge of the MEO or Agency Cost Estimate in the Agency Tender cannot be members of the SSEB. However, members of the PWS Team who are not affected personnel may participate on the SSEB. The draft Circular also provides that personnel who are personally and substantially participating in developing the solicitation or the Agency Tender lose the Right of First Refusal.

24. Pursuant to the draft Circular, the SSA will subject the Agency Tender to a Cost Realism analysis to determine if the cost estimate reflects the requirements of the solicitation. The SSA will validate the Agency Cost Estimate to determine if the estimate was calculated in accordance with Attachment E of the draft Circular and the solicitation. The ATO shall respond to the SSA's request for adjustment to the Agency Tender's Cost Estimate and other questions the SSA may have regarding the Agency Tender. If the SSA and the ATO cannot reach agreement on a specific issue, the 4e Official shall appoint an individual to resolve the disagreement.

25. Under the draft Circular, directly interested parties who can appeal to the AAA are the ATO, a private sector offeror or the official that certifies the public reimbursable tender. The draft Circular also defines Other Interested Parties who have the right to challenge the contents of an Agency's Commercial Activities Inventory under the FAIR Act. This appeal right has been given to private sector

sources, unions, representatives of any business or professional association and affected employees not represented by a union.

26. The draft Circular changes the public review period from 20 calendar days as set forth in Section 7-5 of DA Pam 5-20 to 10 working days. The draft Circular also permits a comment period to allow directly interested parties to comment on any appeals that have been filed with the AAA.

27. The draft Circular also added an additional ground for appeals to the AAA. An appeal can now be filed based on errors in the source selection process.

28. The draft Circular also changed the period of time in which AAA has to issue a decision. Under DA Pam 5-20, Sec. 7-6, AAA had 30 calendar days from receipt of an appeal to issue a decision. Under the draft Circular, AAA now has 30 working days to issue a decision unless the issues are complex, in which case AAA has 45 working days to issue a decision.

29. Under the draft Circular, Agencies are to implement the AAA decision unless an exception is requested by the 4e Official and approved by the Deputy Director for Management of OMB. Under the current procedure, there is no appeal of the AAA decision.

30. The Point of Contact for this subject in the CECOM Legal Office is the undersigned, (732) 532-9801, DSN 992-9801.

JAMES SCURO
Attorney-Advisor